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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THOMAS TAMAYO, Plaintiff and Appellant, v. LYNN ANNE STEINMAN, Defendant and Respondent.	B200581 (Los Angeles County Super. Ct. No. PC 039274)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly Kendig, Judge. Affirmed.

Edgar L. Borne III for Plaintiff and Appellant.

Freedman & Taitelman, Michael A. Taitelman and Jesse A. Kaplan for Defendant and Respondent.

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Thomas Tamayo appeals a judgment entered in favor of respondent Lynn Anne Steinman after the court struck appellant's first amended complaint as untimely and dismissed his action with prejudice. We find no error and affirm.

FACTS AND PROCEDURAL HISTORY[1]

Appellant had a long-term nonmarital living arrangement with respondent dating from 1987. Appellant claimed the couple pooled their funds to buy a home, automobiles and other personal property. The couple separated in April 2005. Appellant asserts he was caused to move out of their residence toward the end of the relationship because of disagreements and illness. He claims that, for undisclosed reasons, title to real property was taken in respondent's name only.

Appellant filed a complaint against respondent for fraud, quiet title, quantum meruit and "punitive damages" in August 2006. The complaint apparently[2] alleged as follows. Sometime before 1988, appellant and respondent orally declared to each other they would live together and hold themselves out to the world as a married couple, work to enrich each other's lives, and grow together spiritually and financially as a couple. They agreed to invest their earnings and energy toward their mutual growth and benefit. About 1988, while traveling in Michigan, the parties "formalized" their relationship as "life partners." They returned to California and continued to live together as a couple "never once denying their life partner community relationship." Appellant contributed all of his earnings and energy toward the life partner relationship and performed personal services for the "community" until he and respondent separated in April 2005. These services included "spiritually,

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[1] Appellant's statement of the case contains not a single citation to the record. We disapprove of such disregard of appellate rules. (See Cal. Rule of Court, rule 8.204(a)(1)(C), (2)(C).)

[2] Because appellant did not include the complaint in the record on appeal, the alleged causes of action and facts are derived from respondent's demurrer to the complaint. The caption of the complaint purportedly also listed "breach of implied contract" and "common counts" as additional causes of action but these claims were not set forth as separate causes of action.

physically and financially maintaining the community residence, lifestyle and growth, and personal health and well-being of [respondent]." (Capitalization omitted.) Respondent requested and accepted appellant's services and assured him he would share in the equity and title to the residence in the future.

Respondent generally demurred to each cause of action of the complaint. Among other things, respondent asserted the law does not recognize causes of action based on false promises to cohabitate; there was no false promise to cohabitate with appellant since appellant alleges respondent did, in fact, live with him for nearly 17 years; and appellant could not have detrimentally relied on any false promise to provide funds to the community because there is no "community" among unmarried partners. Respondent also asserted the claim for an alleged false promise made in 1988 was barred by the three-year statute of limitations and fraud was not pleaded with sufficient specificity. As to appellant's claim for quiet title, respondent argued one claiming an equitable interest in property may not bring an action against the holder of legal title, and the claim in any event is barred by the statute of frauds. Respondent contended appellant cannot recover in quantum meruit for the value of money paid by him or for services allegedly rendered for the benefit of a nonexistent "community." Respondent further moved to strike certain portions of the complaint, including the claim for punitive damages.

The court sustained respondent's demurrer to all causes of action without leave to amend and granted the motion to strike in its entirety on December 6, 2006.[3]

Appellant filed a motion for reconsideration of the court's December 2006 order. The motion asserted that (1) the order was an abuse of discretion and (2) appellant's complaint alleged sufficient facts and was capable of being cured by amendment, "to allege damage specificity [*sic*] and [c]onstructive [t]rust." Respondent opposed this motion,

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[3] Appellant has not provided us with any reporter's transcript of the December 6, 2006 proceedings. In subsequent hearings, the trial judge indicated that, at the initial hearing, she had asked appearance counsel several times to state how the complaint could be amended, but appearance counsel "didn't have anything he could tell me" and "couldn't give me anything."

claiming there was no legal basis on which appellant could recover from respondent and no reasonable possibility the defects could be cured by amendment.

The court heard appellant's motion for reconsideration on February 26, 2007. The court ruled that appellant had failed to comply with the requirements of Code of Civil Procedure section 1008, subdivision (a),[4] and denied the motion.[5] (See § 1008, subd. (a) [motion must be based on "new or different facts, circumstances, or law"].) At the close of the hearing, respondent orally moved to dismiss the action in light of the court's sustaining her demurrer without leave to amend. The court granted the motion to dismiss and ordered respondent to prepare a notice and judgment based on that order. It further denied an oral motion by appellant to reconsider its order sua sponte. Respondent gave appellant notice of this ruling on February 28, 2007, as ordered by the court.

Meanwhile, following the February 26, 2007 hearing, the court issued a minute order denying the motion for reconsideration. On its own authority, however, the court decided to reconsider its ruling and vacate it. In the same minute order denying appellant's motion for reconsideration, the court stated: "After further review of the case, *the court reconsiders sua sponte its ruling* on [respondent's] demurrer and orders [respondent's] demurrer SUSTAINED WITH LEAVE TO AMEND, except on the cause of action for fraudulent inducement, which is sustained without leave to amend. [¶] *Amended complaint is to be*

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4 All further statutory references are to the Code of Civil Procedure.

5 Appellant's counsel argued an "appearance attorney" had covered the prior hearing, as counsel had a medical appointment. Claiming the original complaint was only a draft that "somehow got filed," counsel asked for leave to amend to attempt to state a claim under *Marvin v. Marvin* (1976) 18 Cal.3d 660 (*Marvin*) based on an agreement "of some sort" between the parties and the fact that the parties had lived together for over 17 years and invested together. However, counsel could not articulate what different facts he would plead, asserting only that he needed "additional time to perfect" the pleading. The court invited counsel a number of times to indicate how the pleading could be amended, but counsel declared that "without a library, without pleading forms, without my client," he could not say what would be different. The court explained to counsel that he had already had three months in which to draft an appropriate pleading and "you haven't given me anything so I don't understand how you're going to plead."

filed by 3-13-07. [¶] Dismissal based on previous ruling is hereby set aside and vacated." (Italics added.)

The clerk served a copy of the court's minute order on both attorneys by mail on February 27, 2007.

Appellant did not file any amended pleading by March 13, 2007, as ordered. He instead filed a first amended complaint on March *19*, 2007, six days after the time for filing under the court's order had expired.

Respondent then moved to strike the untimely filed first amended complaint and to dismiss the entire action under sections 435, 436 and 581.

Appellant opposed the motion to strike, stating it "violates applicable Court Rules and ignores well established statutes, principles and practices of [Code] of Civil Procedure, including CCP 473." Appellant's counsel furnished a declaration asserting respondent's motion to strike was "frivolous" and "without legal authority" because "[p]ursuant to standard practice and procedure, and specifically . . . § 1013[, subdivision] (a), [appellant] is entitled to five (5) additional days within which to respond. This gave [appellant] until March 19, 2007 to file since the fifth additional day, March 18, 2007, was a Sunday." He stated the first amended complaint was filed on March 19, 2007, "as permitted by Statute and Court Rules." Appellant did not furnish any declaration to the trial court to explain his delay in filing.

The court struck the first amended complaint. In doing so, the court reiterated that when it sustained the demurrer without leave to amend, it had engaged in a conversation with the appearance attorney regarding whether appellant could amend to cure the defects, but the attorney had nothing to tell the court regarding what appellant could do to cure the defects. The court observed that, in ruling on appellant's motion for reconsideration, the court on its own motion decided to give appellant "one last chance" to amend and set March 13, 2007, as the date by which appellant should amend his complaint.

At the hearing, appellant's counsel blamed appellant's failure to timely file an amended complaint on respondent's failure to serve a notice of ruling of the court's sua sponte order. He also contradictorily claimed a first amended complaint was already on file

as an attachment to the motion for reconsideration, saying he "would have hoped" the court would deem that a filing. He further expressed a belief that he had five additional days in which to file the amended complaint. Finally, he claimed "surprise" in the court's ruling.

The court granted respondent's motion to dismiss the action and entered a judgment in respondent's favor. Appellant timely appealed.

STANDARD OF REVIEW

A trial court's determination to deny leave to file a late amended pleading under section 473, to strike a pleading under section 436 or to dismiss an action under section 581, subdivision (f)(2) is reviewed for abuse of discretion. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) It is the plaintiff's burden to establish such abuse. (*Leader*, *supra*, at p. 612.)

DISCUSSION

1. Section 1013, Subdivision (a)

Appellant asserts the trial court's refusal to apply the provisions of section 1013, subdivision (a) to its sua sponte order granting leave to amend the complaint was an abuse of discretion. We disagree.

Section 1013, subdivision (a) involves the serving of documents by mail. Absent an exception expressly created by statute or court rules, section 1013 applies to any prescribed time period following service by mail. (*Citicorp North America, Inc. v. Superior Court* (1989) 213 Cal.App.3d 563, 567.) When a prescribed time period is *initiated or triggered by service* of a notice, document or request, section 1013 will extend the period. (*Southwest Airlines v. Workers' Comp. Appeals Bd.* (1991) 234 Cal.App.3d 1421, 1426; *Citicorp*, *supra*, at p. 567.) On the other hand, "the cases have consistently held that where a prescribed time period is commenced by *some circumstance, act or occurrence other than service* then section 1013 will not apply." (*Citicorp*, *supra*, at p. 567, italics added; *Southwest*, *supra*, at p. 1426; see also *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 684-685; *San Mateo Federation of Teachers v. Public Employment Relations*

Bd. (1994) 28 Cal.App.4th 150, 152; *Fritts v. County of Kern* (1982) 135 Cal.App.3d 303, 308.)

Here, the time set forth in the court's order was not initiated or triggered by service of any document. The order expressly directed appellant to file any amended complaint "by 3-13-07," a date certain. Section 1013 did not apply because the order on its face did not serve to "initiate" or "trigger" the time to file an amended pleading.

The cases on which appellant relies are cases in which applicable time periods prescribed by statute or rule of court were specifically triggered by service of a notice by mail. (*Triumph Precision Products, Inc. v. Insurance Co. of North America* (1979) 91 Cal.App.3d 362, 364; *Shearer v. Superior Court* (1977) 70 Cal.App.3d 424, 426; *Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172, 173; see *Richards v. Miller* (1980) 106 Cal.App.3d Supp. 13, 17.)

We note, moreover, appellant never contended he failed to receive notice of the court's minute order. He only asserted the time in which he had to act under the order was automatically extended by virtue of section 1013. As discussed, that time was not extended.

2. Failure to Receive "Proper" Notice

Appellant contends he never received "proper" notice of the court's sua sponte ruling as it was not respondent who served the order and, as such, appellant never received notice from the "expected source." He argues that respondent's counsel was aware of the court's sua sponte order and section 1013 would have applied had respondent sent appellant a "corrected notice." We do not agree.

The record reflects that respondent gave appropriate notice to appellant. Respondent was ordered to give notice of the ruling that was made *during the hearing* on February 16, 2007. She complied, serving written notice upon appellant that the court had denied appellant's motion for reconsideration, denied his request to reconsider its order sua sponte and dismissed the action in its entirety upon oral motion. The trial court expressly rejected any notion that respondent was required to give further notice. In granting respondent's motion to strike the first amended complaint, the court explained that "defense counsel didn't know about [the sua sponte order] any more than [appellant] did" and respondent

"can't give . . . notice of something that didn't happen at the hearing." Respondent was not ordered, nor was she required, to give notice of the court's subsequent decision to grant appellant relief sua sponte.

In fact, the clerk gave both parties notice of the sua sponte order by service by mail sent to their counsel's addresses of record. We presume appellant received such notice because he complains of not receiving notice "*from the other side*," not that he was deprived of any notice at all. (Italics added.) Notice by the clerk conformed with the procedure set forth in section 1019.5, subdivision (b). (See § 1019.5, subd. (b) ["When a motion is granted . . . on the court's own motion, notice of the court's order shall be given by the court in the manner provided in this chapter . . ."].) Appellant was not entitled to any more notice. Moreover, contrary to appellant's assertion, two weeks is not an inordinately short time to allow for an amended pleading, particularly because a complaining party has available procedures to apply for an extension if more time is required. (See Cal. Rules of Court, rules 2.20, 3.1200 et seq.)

3. "Surprise" Under Section 473

Though far from a model of clarity, appellant also appears to contend that he was "surprised" by the trial court's sua sponte grant of leave to file an amended complaint and that, based on section 473, the court should not have dismissed his action. We do not agree.

Section 473, subdivision (b), provides, in part, that a court may "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." However, appellant never moved to vacate the court's order of dismissal and judgment to show mistake, inadvertence, surprise or excusable neglect.

In any case, the court's grant of sua sponte relief after the motion for reconsideration hearing could not have resulted in "surprise" to appellant. The court merely granted the precise relief that appellant himself had requested during the hearing. And, appellant all but admits he received notice of the court's sua sponte order from the clerk. Moreover, contrary to appellant's assertion, "sua sponte" does not translate into "suddenly." "Sua sponte"

simply means "Without prompting or suggestion; on its own motion." (Black's Law Dict. (7th ed. 1999) p. 1437.)

To the extent appellant might be claiming the excusable neglect of his counsel, that basis too is unfounded even were it to be considered. "'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error."' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258, italics added by court.) A reasonably prudent person receiving the court's sua sponte order would have been aware that an amended complaint had to be filed no later than March 13, 2007. A failure to comply with the plain words of a court order is not the type of mistake that any reasonable person could have made.

4. Appearance Counsel's Failures

Appellant claims the trial court "lock[ed]" appellant's counsel into the statement made at the first hearing by appearance counsel that he could not state how the complaint could be amended. We need not dwell on this argument because the factual premise on which it is based is not supported by the record.

The trial court did not "lock" appellant into any statement purportedly made by appearance counsel. At the motion for reconsideration, the court engaged in an extensive exchange with appellant's regular counsel, inviting counsel to state how he might amend the

complaint if afforded an opportunity to do so. Appellant's counsel himself was unable to articulate to the court how the pleading would be "different."

5. Possibility of Amendment

Appellant asserts he should have been allowed to amend his complaint to state a *Marvin* claim. We note appellant potentially might have had a *Marvin* claim. However, the record does not establish appellant had any legitimate claim.

A *Marvin* claim only surfaced in the amended complaint and was not a part of the original pleading. The original complaint appeared to be a frivolous, specious pleading. When respondent not surprisingly moved to strike portions of the pleading and demurred to the entire complaint, appellant sent an obviously unprepared attorney to the hearing to defend the pleading. The trial court apparently indicated a willingness to grant leave to amend, but then changed its mind when the appearance attorney could not articulate any basis for amending.

Later, in moving for reconsideration, appellant proffered a pleading that only suggested a *Marvin* action but admittedly did not constitute one. When the trial court decided sua sponte to give appellant another chance and granted leave to file an amended pleading, appellant failed to file within the time allowed. And, when respondent predictably moved to strike the untimely filed amended complaint, appellant's counsel raised only specious arguments in opposition. All of this history supports a conclusion that appellant's claims were specious.

DISPOSITION

The judgment is affirmed. Respondent is to recover costs on appeal.

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FLIER, J.

We concur:

RUBIN, Acting P. J. BIGELOW, J.